Supreme Court, U.S.
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No. 01-1498

In the

Supreme Court of the United States

GENE A. RUTHERFORD, JR.,

Petitioner,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT LAKE MICHIGAN CONTRACTORS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth Circuit Court of Appeals was correct in affirming the District Court's finding that there was not a sufficient showing that Respondent, Lake Michigan Contractors, Inc. (hereinafter referred to as "LMC"), breached any duty of care owed to Petitioner, Gene A. Rutherford, Jr., and in affirming the District Court's entry of summary judgment in favor of LMC on Petitioner's Jones Act negligence claim.

Whether the Sixth Circuit Court of Appeals was correct in affirming the District Court's finding that there was not a sufficient showing that the LMC vessel, the Shirley Joy, was unseaworthy, and in affirming the District Court's entry of summary judgment in favor of LMC on Petitioner's general maritime claim of unseaworthiness.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to the Rules of the Supreme Court of the United States, Lake Michigan Contractors, Inc. makes the following disclosure:

1. Lake Michigan Contractors is not a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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STATEMENT OF THE CASE

Petitioner filed the instant lawsuit against LMC alleging causes of action for negligence under the Jones Act, 46 U.S.C. Sec. 688, and for unseaworthiness under general maritime law. (R.1, Complaint) Petitioner, a deckhand for LMC, claims that his injury occurred as he handed to his fellow deckhand, Mark Clapsadle, a heavy cable to be used to connect a tugboat to a barge. (Gene Rutherford at Tr. 73-75, Respondent's App. 12-14) Following discovery, LMC filed a motion for summary judgment which the District Court granted, entering summary judgment in favor of LMC with respect to Petitioner's Jones Act negligence claim, as well as with respect to his unseaworthiness claim. (*Rutherford v. Lake Michigan Contractors, Inc.*, 132 F. Supp. 2d 592 (W.D. Mich. 2000), R. 56, Opinion and Order, Petitioner's App. 14) Petitioner then requested that the District Court reconsider its ruling, but his motion was denied. (R. 58, Order on Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment, Petitioner's App. 29)

Thereafter, Petitioner filed his Notice of Appeal to the Court of Appeals for the Sixth Circuit. (R. 66, Plaintiff's Notice of Appeal) After briefing and argument, the Sixth Circuit affirmed the summary judgment. (*Rutherford v. Lake Michigan Contractors, Inc.*, 28 Fed. Appx. 395, 2002 WL 22352, 2002 U.S. App. LEXIS 441 (6th Cir. 2002), Petitioner's App. 1)

STATEMENT OF THE FACTS

I. PETITIONER'S WORK FOR LAKE MICHIGAN CONTRACTORS

In August of 1997, Petitioner was employed as a full-time deckhand for LMC where, among other things, he handled lines and tied up barges on a tugboat called the Shirley Joy that was participating in the dredging of the Genesee River in New York. (Gene Rutherford at Tr. 11, 20, 29-30, Respondent's App. 1-4) One of the duties of Petitioner and other deckhands on the Shirley Joy was to "face up" or connect the tugboat with barges full of mud and debris dredged from the river, so that the tugboat could move the barges to another part of the river and dump them. (Gene Rutherford at Tr. 29, Respondent's App. 3-4) This procedure was accomplished by two deckhands from the Shirley Joy, though a third deckhand aboard the tugboat, who was off duty while the other two deckhands worked, was available to assist if the other deckhands thought they needed help. (Mark Clapsadle at Tr. 21, Respondent's App. 17-18)

In order to connect a full barge to the Shirley Joy, one of the deckhands, in this case Petitioner, positioned himself on the bow of the Shirley Joy, while the other, here deckhand Mark Clapsadle, stood on the barge about six to eight feet below. (Mark Clapsadle at Tr. 62, 65-66, Respondent's App. 25-26, 28-29) The deckhand standing on the Shirley Joy would, one at a time, transfer two cables to the deckhand on the barge who then connected the cables to the corners of the barge. (Mark Clapsadle at Tr. 38, 63, Respondent's App. 22-23, 26-27) In order to pass the cable, the deckhand on the Shirley Joy used a six-foot hemp rope that was attached to the cable to lower the cable to the other deckhand. (Mark Clapsadle at Tr. 28-30, 64, Respondent's App. 18-20, 27-28) The hemp rope provided leverage, so the deckhand on the Shirley Joy did not have to lean over to lower the cable. (Mark Clapsadle at Tr. 28, 65, Respon-

dent's App. 18, 28) Gravity then took over and did some of the work in lowering the cable. (Mark Clapsadle at Tr. 65, Respondent's App. 28) The deckhand on the barge (again here Clapsadle), who had the more difficult job than the other deckhand (Petitioner), thereafter took the cable and attached it to the barge. (Mark Clapsadle at Tr. 28-31, 38, 64, Respondent's App. 18-23, 27-28)

II. STEEL CABLES AND KEVLAR LINES

When Petitioner started working at the Genesee River project, LMC used Kevlar lines to connect the Shirley Joy to the barges, as opposed to the steel cables with which Petitioner had previously been familiar. (Gene Rutherford at Tr. 30, Respondent's App. 4) Kevlar lines were made of a nylon-like material, and were lighter in weight than the steel cables. (Mark Clapsadle at Tr. 33, Respondent's App. 22) LMC initially tried using the Kevlar line on the Genessee River project because it was thought to be stronger. (Wayne Moon Tr. at 22, Respondent's App. 32-33) However, the Kevlar lines, once put into use, were found to lack the durability of steel cable. (Mark Clapsadle at Tr. 60, Respondent's App. 24-25) In fact, LMC had to discontinue using the Kevlar lines, and resume using steel cables, because of problems it was having with the Kevlar lines breaking. For example, in the less than three weeks that Petitioner worked on the Genesee River project, the Kevlar lines had already broken twice, one incident occurring while a full barge was attached to the tugboat. (Gene Rutherford at Tr. 32-33, Respondent's App. 5-6)

The breaking of a Kevlar line posed a great danger to the crew of the Shirley Joy as compared to the breaking of steel cable. The propensity of steel cable when it broke was to simply drop in place. (Wayne Moon Tr. at 30, Respondent's App. 39-40) Conversely, when synthetic line (Kevlar) broke, as occurred a number of times on the Genessee River proj-

ect, the line shot back. (Wayne Moon Tr. at 30, Respondent's App. 39-40) For this reason, the Captain of the Shirley Joy ordered that the use of the synthetic line be discontinued for fear that its further breaking would result in someone getting "their head ripped off because these things shoot back like whips." (Wayne Moon Tr. at 30, Respondent's App. 39-40) Moreover, breaking lines such as this create dangerous situations because when one line used to connect a tugboat to a barge breaks, the tugboat loses control of the barge, and if all three of the lines break, the result is a runaway barge. (Gene Rutherford at Tr. 33-34, Respondent's App. 6-7; Mark Clapsadle at Tr. 70-71, Respondent's App. 29-31)

As concerns Petitioner's familiarity with steel cables, at the time he became a full-time deckhand, he anticipated that he would be using steel cables to connect and disconnect barges. (Gene Rutherford at Tr. 40, Respondent's App. 7-8) Thereafter, Petitioner himself never found the steel cables to be in any way defective, nor did he ever hear anyone complain about having to use them, other than simply complaining that they were heavier than the Kevlar lines. (Gene Rutherford at Tr. 60-61, Respondent's App. 10-12)

III. THE INCIDENT IN WHICH PETITIONER ALLEGES HE WAS INJURED

Petitioner claims that on August 20, 1997, while in the course of his normal duties as a deckhand, he suffered an injury to his back. (Gene Rutherford at Tr. 73-74, Respondent's App. 12-13) According to Petitioner, he first felt the injury he claims in this case as he stood on the bow of the Shirley Joy, while another deckhand, Mark Clapsadle, stood below him on a full barge which they were in the process of connecting to the Shirley Joy. (Gene Rutherford at Tr. 73-74, Respondent's App. 12-13)

Petitioner claims he experienced pain as he handed the first cable down to Clapsadle, which he did by using the six-foot hemp rope that was attached to the cable. (Gene Rutherford at Tr. 75, Respondent's App. 13-14; Mark Clapsadle at Tr. 28-30, 64, Respondent's App. 18-20) Petitioner admits that he did not injure his back while lifting the cable, but rather after he already had the cable in hand and was giving it to Clapsadle. (R.42, Plaintiff's Response to Summary Judgment, p.4, Petitioner's App. 34)

IV. BACK BELTS AND ASSISTANCE WERE AVAILABLE TO PETITIONER TO UTILIZE IN HANDLING THE CABLES

It is undisputed that safety belts were available to Petitioner to utilize in handling the cables. Wayne Moon, the Division Manager of LMC, testified that safety belts were provided to the deckhands. (Wayne Moon at Tr. 34, Respondent's App. 43) Mark Clapsadle confirmed this fact by testifying that there was a safety belt aboard the Shirley Joy. (Mark Clapsadle at Tr. 55, Respondent's App. 24)

It is also undisputed that Petitioner knew as a matter of common sense the proper method for lifting heavy objects. (Gene Rutherford at Tr. 51, Respondent's App. 8). Moreover, there was a third deckhand aboard the Shirley Joy if Petitioner needed assistance in handling the steel cables. (Mark Clapsadle at Tr. 21, Respondent's App. 17-18) As Clapsadle testified, if deckhands thought they needed help, they could call another deckhand up on deck. (Mark Clapsadle at Tr. 21, Respondent's App. 17-18)

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals properly affirmed the District Court's entry of summary judgment in favor of LMC because Petitioner could make no factual or legal showing that might allow a jury to conclude that there was negligence on the part of LMC, or that the vessel, the Shirley Joy, was unseaworthy. (Petitioner's App. 1-13) In fact, Petitioner presented evidence of nothing more than his being injured while performing his normal job duties of handling a steel cable, a task that the Sixth Circuit Court of Appeals found was routinely and frequently performed by deckhands without injury. (Petitioner's App. 11) As a legion of maritime decisions makes clear, such a showing fails to provide the basis on which to sustain either a Jones Act negligence claim, or an unseaworthiness claim.

The Petition for Writ of Certiorari of Petitioner is fundamentally ill-conceived. It is simply a repackaged version of the virtually identical failed arguments that Petitioner made to the Sixth Circuit Court of Appeals. As he did before the Sixth Circuit, and as he did in the District Court prior to that, Petitioner here does little more than thrust a multitude of cases upon this Court, cases which are all clearly distinguishable from the instant one, and which were all considered and properly rejected by the Sixth Circuit. Thus, for no greater reason than he disagrees with the decision of the Sixth Circuit Court of Appeals, Petitioner now asks this Court to review this case even though the Sixth Circuit properly applied age-old principles of maritime law.

When stripped of its rhetoric, it is beyond question that the Petition for Writ of Certiorari of Petitioner satisfies none of the standards set forth in the Supreme Court Rules pursuant to which this Court may grant a petition for writ

of certiorari. To the contrary, as demonstrated in this brief, the Sixth Circuit Court of Appeals' decision affirming the District Court's entry of summary judgment in favor of LMC is consistent, rather than in conflict, with prior decisions of this Court, and with decisions of not only other United States Courts of Appeals, but lower courts as well, wherein maritime law was applied.

ARGUMENT

I. PETITIONER FAILED TO SHOW THAT THE STEEL CABLES WERE DEFECTIVE OR THAT PETITIONER WAS REQUIRED TO HANDLE THEM IN A MANNER THAT WAS NOT REASONABLY SAFE

Petitioner presented not one scintilla of evidence to establish that the steel cables were in any way defective. This fact was aptly noted by the Sixth Circuit when it stated, "There was no evidence on the condition of the cable that plaintiff was handling, other than that it was heavier than the synthetic cable, and that it weighed 120 to 150 pounds." (Petitioner's App. p. 12) Nor did Petitioner present any evidence of his having been required to handle the cable in a manner that was not reasonably safe. This again was particularly noted by the Sixth Circuit Court of Appeals which found it significant that Petitioner offered "no evidence, expert or otherwise, in this case that one deckhand could not safely handle a steel cable." (Petitioner's App. 12) Instead, as the Sixth Circuit held, "All that plaintiff showed in this case is that he hurt his back while performing a task that was routinely and frequently performed by deckhands without injury." (Petitioner's Apx. 8)

Now, in his Petition for Writ of Certiorari before this Court, exactly as he did in the lower courts, the only thing that Petitioner says about the cables themselves, and which is, in fact, the essence of Petitioner's claims of negligence and unseaworthiness against LMC, is that the steel cables

he was required to handle as part of his duties as a deckhand were heavy and awkward to move. (Petitioner's Petition, pp. 10-11). However, maritime law clearly rejects the notion that a vessel owner can be liable for merely requiring a seaman to move or lift heavy or awkward objects. Rather, to obtain any remedy under maritime law, other than maintenance and cure, there must be some factual and legal basis to support liability of the shipowner under the Jones Act for negligence or for unseaworthiness. *See Carlton v. M/G Transport Services, Inc.*, 698 F. 2d 846 (6th Cir. 1983); *Chisholm v. Sabine Towing & Transportation Co.*, 679 F.2d 60 (5th Cir. 1982); *Carleno v. Marine Transport Lines, Inc.*, 317 F.2d 662, 664 (4th Cir. 1963); *Lyons v. Ohio River Sand & Gravel*, 683 F.2d 99, 101 (4th Cir. 1982); *Harris v. American Export Lines, Inc.*, 1980 A.M.C. 2652 (E.D. Pa. 1978) *affirmed* 609 F. 2d 501, (3rd Cir. 1978); *Martinez v. Sea Land Service, Inc.*, 637 F. Supp. 503 (D.P.R. 1986); *Roche v. U.S.*, 1990 A.M.C. 2696 (E.D. La. 1990). Here, there is none.

In both the District Court and in the Sixth Circuit Court of Appeals Petitioner attempted to make up for his evidentiary shortcomings with his own unsupported and conclusory claim that LMC should have used Kevlar lines rather than steel cables. However, case law has consistently declared that this type of speculation and conjecture is insufficient, as a matter of maritime law, to support a claim that an employer failed to exercise reasonable care within the meaning of the Jones Act, or failed to provide equipment that was reasonably fit within the meaning of the general maritime doctrine of seaworthiness. *See e.g., Carlton v. M/G Transport Services, Inc.*, 698 F. 2d 846 (6th Cir. 1983); *Brantley v. Hollywood Casino-Aurora, Inc.*, 1998 WL 513089 (N.D. Ill. 1998); *Lindemann v. Empress Casino*, 1999 WL 59839 (N.D.Ill. 1999) (motion to reconsider denied) *citing Taylor v. Monsanto Co.*, 150 F.3d 806, 809 (7th

Cir. 1998) and *Darnell v. Target Stores*, 16 F.3d 174, 176-77 (7th Cir. 1994).

Plaintiff's conjecture fails as a matter of law, in short, because there is a total void of evidence that in any way indicates that the steel cables used by LMC, and which Petitioner knew he would be handling before he was injured, were defective, unsafe, or failed to meet the standard of reasonable fitness. Moreover, as concluded by the Sixth Circuit, "There was no evidence that having one deckhand handle a steel cable was either dangerous or an unorthodox method or practice." (Petitioner's App. 8)

II. PETITIONER FAILED TO SHOW THAT THE USE OF STEEL CABLE INSTEAD OF KEVLAR LINE WAS NEGLIGENT OR CREATED AN UNSEAWORTHY CONDITION

Petitioner baldly asserts that LMC was negligent, and that the Shirley Joy was unseaworthy, because synthetic line was stronger and safer than steel cable, was preferred by crewmembers, and was a viable alternative to steel cable. (Petitioner's Petition, pp. 11-14) However, again, there is simply no evidentiary support in the record that establishes that steel cable was not reasonably fit and safe to use to face up the Shirley Joy to a barge. Furthermore, Petitioner provided no evidence that established that the non-use of synthetic line proximately caused his alleged injury. Put bluntly, merely saying it does not make it so.

As clearly articulated by the trial court (and affirmed by the appellate court), Petitioner "has simply presented no evidence that the lighter, synthetic cables would have made his back injury less likely to occur." (R. 56, Opinion and Order, p. 6, Petitioner's App. 20) Thus, without any evidence, Petitioner's self-serving and conclusory allegations, not in any way supported by the evidentiary record, were

properly rejected by the District Court and by the Sixth Circuit Court of Appeals.

III. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S CONTENTIONS THAT HE WAS NOT PROVIDED WITH ADEQUATE ASSISTANCE OR A SAFETY BELT

Petitioner also tries to avoid addressing the non-defectiveness of the steel cable by merely claiming that he was not provided with adequate assistance, or with a safety belt, in his handling of the cable, and that his lifting the cable would have been easier if he had been assisted by another man. (Petitioner's Petition, p. 16) However, there is nothing in the record that even remotely suggests that more than two deckhands were needed in order to handle the cables safely. Rather, as the Sixth Circuit Court of Appeals found, "There was no evidence that having one deckhand handle a steel cable was either dangerous or an unorthodox method or practice." (Petitioner's App. 8) Nor was there any evidence that LMC precluded Petitioner from obtaining assistance in handling the cables, if Petitioner believed such assistance was necessary. In fact, such assistance was available, simply by asking.[1]

Moreover, it was undisputed that safety belts were available to Petitioner to utilize in handling the cables. (Wayne Moon at Tr. 34, Respondent's App. 43; Mark Clapsadle at Tr. 55, Respondent's App. 24) Yet, even if such safety belts were not available, as the Sixth Circuit Court of Appeals pointed out, "There was no evidence upon which a jury could reasonably find that weight belts would have prevented plaintiff's injury or reasonably find that defendant's failure to provide them constituted negligence." (Petition-

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[1] As testified by Mark Clapsadle, if deckhands thought they needed help, they could, in fact, request a fellow deckhand to come up on deck to assist. (Mark Clapsadle at Tr. 21, App. 17-18)

er's App. 11) The Sixth Circuit also noted, "Nor was there any evidence that weight belts were necessary to permit the deckhands to lift the steel cable with reasonable safety." (Petitioner's App. 12) Thus, there was no evidentiary basis to support Petitioner's conclusory allegations and, in fact, the undisputed evidence demonstrates the opposite.

IV. THE CASES CITED BY PETITIONER ARE READILY DISTINGUISHABLE FROM THE INSTANT ONE

The Sixth Circuit Court of Appeals previously considered the same cases that Petitioner now advances in its Petition for Writ of Certiorari. In doing so, the Sixth Circuit determined that all of the cases relied on by Petitioner were distinguishable from the instant case due to "the existence of evidence of negligence" in those other cases. (Petitioner's App. 8) That is, in each case (unlike here) there was evidence of some defective or dangerous condition apart from the fact that an object being lifted or handled was heavy.

Contrary to all of those cases, however, here there was no evidence of negligence on the part of LMC, or of the unseaworthiness of the Shirley Joy. There was no evidence that Petitioner and Clapsadle constituted an insufficient number of crewmen to handle the steel cables safely; there was no testimony from a safety expert or other qualified individual (aside from Petitioner's own speculation and conjecture) regarding the weight and stress placed on an individual engaged in lifting the steel cable, and the relative safety of an individual doing so; there was no evidence that either Petitioner or Clapsadle were too inexperienced, inept or exhausted to handle the steel cables safely; there was no evidence that established that the steel cables, or any aspect of the Shirley Joy, were not working properly or were defective; and there was no evidence of Petitioner or anyone else having complained to Lake Michigan Contractors about anything that prevented them from handling the

steel cables safely. As such, the cases cited by Petitioner have absolutely no relevance to the case before this Court, other than to magnify by contrast the lack of evidence which exists here.

V. THE EXISTENCE OF THE RETAINING WALL ON THE BOW OF THE SHIRLEY JOY CANNOT SUSTAIN PETITIONER'S CLAIMS OF JONES ACT NEGLIGENCE OR UNSEAWORTHINESS

With no evidence of a defect in the steel cable, Petitioner desperately argues that the Shirley Joy itself was defective because it had a retaining wall near the bow which prevented him from bending at the knees while lifting the cable. (Petitioner's Petition, pp.14-15) However, this is simply a false issue. Initially, Petitioner again offers no evidence, expert or otherwise, to support his contention that the wall presented him with an unreasonably dangerous condition in which to handle the cable. Moreover, Petitioner's own deposition testimony undermines his contention. As Petitioner testified, "There's got to be a wall there. If the wall wasn't there the water would be coming right on the boat. . . It breaks the waves . . . anybody knows that if you got a boat it's got to have a wall or water is going to come in it." (Gene Rutherford at Tr. 123-124, Respondent's App. 14-16)

Additionally, Petitioner's own deposition testimony and his District Court Response brief establish that the retaining wall had nothing to do with his alleged injury. In both, Petitioner asserted only that the wall inhibited his ability to pick up or lift the cable. (R.42, Plaintiff's Response to Summary Judgment, p.6, Petitioner's App 37; Gene Rutherford at Tr. 51-53, Respondent's App. 8-10) Further, in his District Court Response brief, Petitioner candidly admitted that his injury occurred, not while he was lifting the cable, but rather after he already had the cable in hand and was

giving it to Clapsadle. (R.42, Plaintiff's Response to Summary Judgment, p.4, Petitioner's App. 34)

As described above, passing the cable to Clapsadle did not require Petitioner to bend or lean over. (Mark Clapsadle at Tr. 28, 64-65, Respondent's App. 18, 27-28) Thus, the difficulty Petitioner claims he had in bending at the knees because of the wall could not have caused his alleged back injury.

VI. PETITIONER'S COMMENTARY REGARDING THE ISSUE OF COMPARATIVE NEGLIGENCE HAS NO RELEVANCE TO THIS CASE

A substantial portion of Petitioner's brief is dedicated to advising this Court that Petitioner's own negligence in causing his injury does not necessarily bar a seaman from recovering damages under the Jones Act or for unseaworthiness. LMC does not dispute this point, and in fact readily accepts it as a correct proposition of maritime law. However, the issue of comparative negligence only has relevance in cases where plaintiffs can first sustain their claims with some evidence of negligence on the part of their employer, or evidence of the unseaworthiness of their employer's vessel. On the other hand, as in this case, where there is no evidence of the employer's negligence or of the unseaworthiness of the vessel, whether the plaintiff himself was or was not negligent in causing his own injury does not affect the outcome of the case. The plaintiff simply can recover nothing, an amount which cannot be further diminished by his own negligence.

VII. THE SIXTH CIRCUIT COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF LMC

When the factual record is devoid of any support with respect to arguments raised by a plaintiff in opposition to

a motion for summary judgment, the arguments should be rejected. *See e.g., Harris v. American Export Lines, Inc.*, 1980 A.M.C. 2652 (E.D. Pa. 1978) *affirmed* 609 F.2d 501, (3rd Cir. 1978). Here, as correctly concluded by both the District Court and the Sixth Circuit Court of Appeals, Petitioner failed to produce any evidence of negligence on the part of LMC, or of the unseaworthiness of the Shirley Joy. (Petitioner's App. 1-13) Rather, in total, the evidence that Petitioner did put forth established nothing more than that Petitioner was injured while performing his normal job duties of handling a steel cable that was heavy. (Petitioner's App. 11)

In light of the lack of evidence that LMC was negligent or that the Shirley Joy was unseaworthy, there was no basis on which to sustain Petitioner's claims under maritime law. Therefore, the District Court was correct in entering summary judgment in favor of LMC as a matter of law, and accordingly, it was also proper for the Sixth Circuit Court of Appeals to affirm the District Court's entry of summary judgment in favor of LMC.

CONCLUSION

Petitioner's status as an aggrieved litigant whose claim has been rejected on the basis of well-settled legal rules is no different from that of numerous other disappointed suitors. He offers no valid reason why this Court should grant his Petition for Writ of Certiorari and review the well-reasoned and absolutely correct decision of the Sixth Circuit Court of Appeals.

In particular, Petitioner is unable to establish that any conflict exists among various circuits of the United States Court of Appeals that might be relevant to his claims, and is unable to establish that the decision of the Sixth Circuit Court of Appeals herein was inconsistent with established

maritime law. The reason for his failure is fundamental—nothing in the maritime law exists that permits a plaintiff to avoid a motion for summary judgment, and to proceed on his claims of Jones Act negligence and unseaworthiness, when the record is void of evidence of negligence on the part of the vessel owner, and void of evidence of the unseaworthiness of the vessel.

As such, the well-considered decision of the Sixth Circuit Court of Appeals should be allowed to stand as the final disposition of this action, and the Petition for Writ of Certiorari should be denied.

WHEREFORE, based upon the foregoing, Respondent, Lake Michigan Contractors, Inc., respectfully requests that this Court enter an Order denying the Petition for Writ of Certiorari of Petitioner, Gene A. Rutherford, Jr.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENE A. RUTHERFORD, JR.,)
)
Plaintiff,)
vs.) Case No. 1:98CV769
) Hon. Wendell A. Miles
LAKE MICHIGAN)
CONTRACTORS, INC.,)
)
Defendant.)

Deposition of GENE A. RUTHERFORD, JR. taken under the provisions of the Federal Rules of Civil Procedure before Carrie S. Clark-Berry (CSR-4402), Certified Shorthand Reporter and Notary Public, at Sukup & Grimm, 146 Monroe Center, NW, Suite 1526, Grand Rapids, Michigan, on Thursday, May 6, 1999, commencing at 11:32 a.m., pursuant to Notice.

* * * * * *

[11] Q. Are all of those various tasks done on land?

A. Yeah. And then I did some fill-in on tugs when needed.

Q. Now at some point did you change positions to the position of deckhand?

A. Yes.

Q. Okay. Do you recall when that was?

A. Well, I did it once—what was it, '96? I think once in '96. I worked for a little over a week on a tug as deckhand.

Q. Okay. And then at some point later on—

A. In '97.

Q. —in '97 you began working as a deckhand full time?

A. Yes, in Rochester.

Q. Do you know specifically when in '97 you became a full-time deckhand?

A. It was in August of '97.

Q. Okay. Possibly late July of '97 or early August?

A. Yeah.

Q. And prior to then, late July or early August of '97, you had worked as a deckhand for about one week; is that correct?

A. You mean in '96?

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[20] deckhand in '97 did you do any sort of training at that time?

A. No.

Q. Were you continuing to learn as you went along?

A. Yes.

Q. Or had you learned up to that time all there was to learn about being a deckhand?

A. No, I never learned it all. There's a lot to decking.

Q. Okay. And when you started as a full-time deckhand then the first project you worked was where?

A. Rochester, New York.

Q. And what vessel were you on?

A. Shirley Joy.

Q. Can you describe the project that was going on in Rochester, New York?

A. We were dredging the Genesee River.

Q. Can you explain a little bit what dredging the river entails?

A. It's where they take the mud and debris out of the river so the bigger vessels can come through.

Q. Was this project being done entirely by Lake Michigan Contractors?

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[29] some days, you know. It all depends on the situation.

Q. What generally were your duties and responsibilities on the Shirley Joy? Were they similar to what you described your duties were on the Curly B?

A. Basically whatever you're told to do as a deckhand.

Q. Since you were up there for a limited period of time, about three weeks or so, can you tell me generally the types of things that you did out there on the Shirley Joy?

A. Well, we faced up the barges.

Q. And by that you mean connected the barges to the tug?

A. Connected the barges, yup.

Q. Okay. What else?

A. We'd have to dump. Take them out to the lake and dump them. And we'd have to clean the boat, check the engines, change the oil if it was needed.

Q. And reattach barges to the dredge?

A. Yes.

Q. What did dumping the barges in the lake entail?

A. You go out about a mile and a half out in the

[30] lake, and the barges have pockets in them. They've got a diesel engine on the barge itself. You start it up, and then what they do is they pop the pockets and it just lets the mud out the bottom.

Q. What does the deckhand do in terms of bringing about the dumping of the barge?

A. He has to climb up—or down on the barge when it's full, start the engine up on the barge, and pop the pockets.

Q. Popping the pockets is done mechanically?

A. Sometimes. There was one barge or two barges we had to do manually on some pockets. The pockets wouldn't open so you'd have to take a bar and pry up—I don't know what you call it. The ram on the side would be locked and you'd have to try to pry it up on the bar. You'd have to take two deckhands.

Q. Now in terms of facing up barges or attaching or de-attaching them from the barges—from the dredge, were you again using the same types of cables that you used when you were working on the Curly B?

A. No. At the time I was on the Shirley Joy, at that time we had—I think the name of it was

[31] Kevlar lines.

Q. Kevlar lines?

A. Kevlar, yeah.

Q. K-e-v-l-a-r, I think this is. Can you describe what those are?

A. It's like rope. It's lightweight.

Q. Can you tell me how Kevlar lines are different from the cables that you described that you were using on the Curly B?

A. A whole lot lighter. I mean you can lift it with one hand.

Q. When you say "it," you're talking about the four feet or so that you normally have to hold?

A. Yeah.

Q. With the eye of the line?

A. Yeah.

Q. So it sounds like those lines were no more than how much weight?

A. I just—just hardly any weight at all there.

Q. The steel cable, could you hold it with one hand?

A. No. You'd have to hold on with two hands because—if you're on a muddy barge and you have to have one hand on the cable you take a chance of getting pulled into the lake or the

[32] river or whatever. I mean there's a lot of weight there.

Q. And did you use the Kevlar lines the whole time that you were out there on the Rochester project?

A. Not the whole time, because we had to go to steel cables because the Kevlar lines broke.

Q. Can you tell me what period of time during those three weeks you used Kevlar lines versus steel cable?

A. Most of the time I was up there we had Kevlar. I don't remember exactly when we changed to the steel ones.

Q. Had you ever observed the Kevlar lines breaking?

A. Yes.

Q. Can you tell me how many times when you were on that project the Kevlar lines broke?

A. Two.

Q. Where did they break?

A. I guess you would call it right at the shock. What I mean by the shock is where it's coming off of the tug on the side. It's like a shock absorber, they call it, but it's bigger rope.

Q. And both instances it broke about the same place?

[33] A. Yeah, basically.

Q. And in those two instances was it a full barge or an empty barge that was attached to the tug?

A. I think once it was a full one and once it was an empty one. I'm not positive on that.

Q. Do you recall what happened when the lines broke?

A. Well, we were pushing the barge, and when the line breaks the barge can get away from the tug.

Q. How many lines were there from the tug to the barge?

A. You usually run three.

Q. And if one of those three is disconnected can the tug lose control of the barge?

A. Well, you got one on each side of the boat that goes up to the bits on the barge itself and then what they call—in the bow on the center of the tug we usually throw a soft line, they call it, just for safety in case one of the side lines do break the barge don't get completely away.

Q. And obviously if all of the lines from the barge to the tug broke then the tug would lose control of the barge?

A. You'd have a runaway barge.

[34] Q. Was there other—were there other vessels in the Rochester River anywhere near where you were working?

A. You mean besides Lake Michigan?

Q. Right.

A. Yes. There was boats in some places in the river. I guess you call it docked.

Q. About how far away from where you were working?

A. They were docked all up and down the river there.

Q. How close did the other boats come to where you were working?

A. Some of them got pretty close. Four or five feet away sometimes. It all depends on what side of the river they were doing.

Q. I take it then that a runaway barge would have presented quite a danger to other vessels in that river?

A. If it broke in the river, yeah.

Q. Right.

A. If it broke when you were out on the lake in rough water or—you know, it all depends on the circumstances.

Q. Were there other vessels out on the lake?

A. Yeah. There's traffic in and out.

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[40] Q. And those—it turned out to be the cables you actually worked with were the type that you expected you would be working with?

A. You mean did I know they were going to be steel cables and not Kevlar or whatever?

Q. Right.

A. Well, actually I don't really know because I didn't even know about the Kevlar.

Q. Well, what I'm saying is, based on your prior experience, when you started full time did you expect that you would be using steel cables to do the work?

A. I thought I would. When I got up there they had the Kevlar in there. They were running Kevlar when I got up there.

Q. But ultimately then the steel cables that they switched back to—or they switched to were the ones that you originally expected you'd be using anyway?

A. Well, I've used them before, if that's what you're asking. I knew that they were on there.

Q. So that didn't come as any surprise, right?

A. No.

Q. And the size of the cable was basically what you expected?

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[51] nothing to show. You just grab it. You're just standing there, you grab it, and throw it up on the mold.

Q. Any other jobs or any other experience that you had where you were trained in how to lift equipment or objects or anything of that nature?

A. There's no job I ever worked that actually showed me how to pick things up.

Q. Okay.

A. Automatically I know to use my knees. I mean that's common sense.

Q. And when you say "use your knees," can you be—

A. Bend at the knees to pick up. In some cases you can't bend at the knees. Like on the boats when you're handling cables on the side you cannot bend.

Q. Okay. And describe again why it is that you can't bend on the boats.

A. Because you would hit your knees on the side. You got the side of the boat here (indicating), and you got to reach over the side to get a cable. How are you going to bend? You're going to bump your knees.

Q. Okay. On the barge there's no sides, right?

A. On the barge itself?

[52] Q. Right.

A. Well, on the outside, no. There's like a wall that goes completely around the barge about, I don't know, two, three-foot high.

Q. Okay.

A. But on the outside, no.

Q. In terms of when you're lifting cable there, the same problem you had bending your knees on the boat is not present on the barge; is that correct?

A. When I was on the barge taking the cables off to hand them to the deckhand on the boat and we was taking them off of the barge I would bend at my knees.

Q. Okay. So you were able to bend your knees on the barge?

A. Yes. You can bend over and grab it and get it. Because they used to laugh at me the way I done it.

Q. Is that problem that precludes you from bending at the knees on the boat present in all areas of the boat where you were lifting cable or just particular areas of the boat?

A. You mean bending at the knees while you're taking the cables off?

[53] Q. Right.

A. That's the only place we had to take the cables off, is at the bow of the boat. You cannot bend at the knee and pick up the cable.

(Deposition Exhibit #4 was marked for identification.)

Q. Let me show you a photograph that we've marked as Exhibit #4. I'll ask you to take a look at that for a second.

(Witness examines document.)

Q. Can you tell what this is depicting in the photograph?

A. That's the Shirley Joy.

Q. And that's the boat you were working on on the Rochester project, correct?

A. Yes, sir.

Q. Okay. Do you have a pen down there? Actually I'll give you a yellow marker here that hopefully will show up on there.

MS. SCHORNACK-SMITH: Can we take a break?

MR. CULLINAN: Sure. (Brief recess.)

Q. Going back on the record, very early on I had mentioned—we were discussing one of the

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[60] of the deckhands is standing on the front handing the cable to the deckhand who's on the barge?

A. Yeah. One deckhand here handling the cables to hand them over to the barge over here (indicating).

Q. Okay. And the deckhand that's on the barge is on the flat surface with nothing obstructing him from using his knees to bend, correct?

A. Right.

Q. Okay. Did any of the crew members of the Shirley Joy ever complain about any of the equipment they were provided on the Rochester project?

A. Complain about the equipment?

Q. Right.

A. I've heard guys say their back is sore from lifting cables. I mean—

Q. Did you ever hear any complaints about the cables themselves that they were using either being defective or not sufficient to allow them to do whatever they were doing?

A. Not that they were defective. I mean they get old, they get frayed, like I told you. That's expectable, I guess. They're hanging in the

[61] water, they get rusty.

Q. Okay. Did you ever hear anyone complaining about the condition of the cables?

A. There's been times they say we're going to have to change them because they were looking bad and frayed. What I mean by "frayed" is they're steel and you have spots that break loose that come out in your hand and it cuts your hand.

Q. Okay. Did you ever hear anyone on the crew of the Shirley Joy complaining about anything else having to do with the cables aside from the fraying?

A. Just, like I said, they said their back was sore from lifting them.

Q. And did those complaints have anything to do with the physical qualities of the cable themselves?

A. The cables are heavy. There's no doubt about it. I mean you take steel, compare it to Kevlar, a 100 percent difference.

Q. Would the amount of cable that you had to handle in working as a deckhand at any given time be more than 25 pounds?

A. Oh, yeah. Definitely.

Q. Can you give me a rough estimate of what the

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[73] Q. Did you miss any time at work?

A. Yeah, but I don't recall how long on that one. I quit that job and got another job.

Q. Were the areas of your back on each of these occasions the same?

A. The same as relating to what?

Q. Did you hurt the same area of your back in the first instance as you did in the second instance?

A. I don't know if it was the same or not. I mean it's just like I pulled a muscle and my back was sore.

Q. Was this in your lower back or your upper back?

A. Lower.

Q. On both occasions?

A. I think so, yeah.

Q. Now aside from those two instances, prior to August 20 you hadn't had any other problems with your back; is that correct?

A. You mean after the second one you've just written down?

Q. Yeah.

A. No, sir.

Q. And then at some point on August 20th of 1997 you began having pain in your back?

[74] A. Yes.

Q. Okay. And that was the first time in the relatively near past that you had had any pain? In other words, for the first 19 days of August you hadn't had any pain in your lower back?

A. I mean a little sore. Like I said, all the other guys, you know lifted the cables and you're sore. But what you're asking me though, when I got hurt it was severe. I never had nothing like that.

Q. Okay. And did that happen all at once on August 20th of '97?

A. Yeah.

Q. Okay. When that began happening all at once can you tell me exactly what it was you were doing?

A. I was handing the cable to Mark on the barge.

Q. Where were you standing?

A. On the bow of the tug.

Q. Were you connecting or disconnecting the barge?

A. Connecting to a full barge.

Q. So you were about to remove that barge to dump it somewhere down the lake?

A. Yeah. It was connected to the Ojibway.

Q. Now when you are going out to take a full barge to dump it am I correct that you would connect

[75] the tug first to the barge and then disconnect the barge from the dredge?

A. Yes.

Q. And is that what you were doing at that time?

A. Yeah.

Q. Okay. So at the time you started feeling pain was it still connected to the dredge, the barge?

A. We were connecting to the barge. When I grabbed the first cable on port side, and I don't remember if the cable was stuck on a tire or what, but I had to bend over the side to get it to hand it to Mark.

Q. Okay.

A. To connect up.

Q. Okay.

A. That's when I felt a pain in my back.

Q. All right. And then what happened?

A. I tried to brush it off, you know. And I knew I felt something, but I went over and was finishing my job. I went over to get the other cable, than I climbed down on the barge to help Mark get the cables off the side of the barge from the Ojibway. He was on the head and I was on the stern, I guess you would call it. And then I picked up that cable. And I remember

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[123] A. Why?

Q. Yeah.

A. I haven't even tried fishing. I come home from work now and I hit the couch. I'm whipped. I mean, I'm dead tired. I don't feel like doing anything.

Q. Is that because of your back or just because of the nature of your work?

A. It's because of my back, yeah. It's because of my back.

Q. That wall around the sides of the Shirley Joy—

A. The wall around here going around the boat (indicating)?

Q. Right. Do you have any understanding of what that wall is for?

A. There's got to be a wall there. If the wall wasn't there the water would be coming right on the boat. It's like a V. It breaks the waves. I mean that's pretty obvious.

Q. And the way it is shaped in that photograph and the way it actually is shaped, in your opinion is that necessary to break the waves, et cetera? The height, et cetera?

A. Yeah, there's no doubt.

MS. SCHORNACK-SMITH: I'm not

[124] sure there's foundation to ask questions about ship building questions.

A. I'm not a boat expert.

MS. SCHORNACK-SMITH: Ship design.

A. I don't know what you're trying to get at. I'm not a boat expert.

Q. All right. But based on your experience there is a purpose for that wall to be there?

A. I don't know what you're trying to get at. I mean, anybody knows that if you got a boat it's got to have a wall or water is going to come in it.

Q. So it does have a purpose then as far as you know?

A. I don't know what you're getting at. What do you want me to tell you?

Q. I just want you to answer the question.

A. I don't understand what you're trying to ask me.

Q. Based on your knowledge is there a purpose of the wall? You said—

A. If you didn't have a wall there you'd fall off the boat or whatever. So evidently it has to be there.

Q. So is the answer yes then?

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 1:98-CV-769
	)	
LAKE MICHIGAN CONTRACTORS, INC.,	)	
	)	
Defendant.	)	

Telephone deposition of MARK DAVID CLAPSADLE, taken pursuant to Notice, at 141 Pin Oak Drive, Williamsville, New York, on July 8, 1999, commencing at 11:20 a.m., before ADRIANNE HUNT, C.P., Notary Public.

[21] six-hour shifts all the time and somebody else not having to.

Q. Okay. But for the most part there were three people participating when it came to loading or, I'm sorry, facing the wires between the tug and the barge?

A. No. When you would face up, there would only be two.

Q. Okay. I guess that's where I wasn't clear.

A. One of the guys that had his six-hour shifts, only one of them guys is on his shift. The other guy has his six hours off.

Q. Okay. I thought it was the flopper that worked opposite the other two guys?

A. No, the flopper works with both guys.

Q. All right.

A. Only—only when he's needed.

Q. Okay. Who—did you, as a deck hand, could you make the decision to call him up, get him up out of bed, you know, call him up on deck if you thought you needed help?

A. That's correct. We would already been mated to the empty because we went out and dumped it. We came back with it empty after we dumped on the lake. We

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Clapsadle - Shornack-Smith - 07/08/99

[28] deck hand on the bow of the tug, which would lower a hemp rope that was hooked right up to your cable, rather than trying to lean all the way over and hand the cable, we had an extra six-foot of line to where you could just hand the cable down hand-over-hand on a hemp rope. That would be handed to the other deck hand which was already down below on the barge.

Q. Okay. But the cable itself is—I understand there's a winch. Is there a length of it that—you know, attached or hanging off the bow? Where is that actually stored?

A. when it's not in use, once we unhook off of the empty—well, on the empty barge, your height of your barge is up higher with the bow. When you hook to a loaded barge, the barge is sunk more in the water because of the weight of the mud and sludge it's loaded in it. So you're working with two different levels as you're hooking and unhooking there.

Q. Okay. Which requires you to do what? How do you—you described a six-foot hemp rope?

A. Yes.

Q. And that's somehow attached to what, the end of the cable?

[29] A. Your cable coming off of the tug is more or less a double cable. It's a hoop. You're coming off of the winch, out doing a hoop around the bit on the barge, then the cable comes back, and the end of that is hooked into the side of the tug, farther back from the winches.

Q. Okay.

A. So you're coming off the side of the tug, out around the bit, and then back into the winch.

Q. So the hemp line is what's hooked to that hoop?

A. It's more or less on a slide clevis. So that it does slide on the cable.

Q. But where is the hoop of the cable when that rope is not being used?

A. The hoop of the cable if that cable is not being used, that cable is brought up and hooked right on the bit that's right on the bow of the boat.

Q. Okay. And the hemp line is then located where?

A. That would just be hanging inside right on the front deck.

Q. Now, is the—is any of the cables stored over the side of the tug at all?

A. All of the cable is stored. You don't bring the

[30] cable on. The cable is more or less hung over the edge of the bow. And brought up to where just the hoop of the cable is around the bit on the front of the tug.

Q. Okay. So I take it when you're lifting this hemp rope that's attached to this hoop at end of this cable, right?

A. You would unhook the—the hoop that's on the bit on the front of the tug, you would unhook that by holding the cable. Once you have it unhooked off the bit, you would grab hold of the hemp rope and lower the hoop of the cable down, holding onto the hemp rope.

Q. Okay. And then it's the person on the barge that takes the hemp rope?

A. Correct.

Q. And pulls the slack of the cable out towards them?

A. Correct.

Q. And pulls the slack of the cable out towards them?

A. Correct.

Q. Okay. Now, is that—I guess I need you to explain is how—is that pulling from the winch?

In other words, if it's looped over the side of the tug, and all this guy on the barge has is the hemp

[31] rope, how does he get the remaining slack off the side of the tug?

A. Once you have a hold of the hemp rope, you can more or less just hold it and back up like you would a tug-of-war pull. You pull that rope back to where you've got enough slack, that's where the Captain's also watching if you need more slack, he'll feed you slack out of the winch, which will slide.

So you have that rope with a clevis on it, that will slide on that cable. So you're always at the center point of that hoop. So if he's letting out more cable, that clevis will slide on the cable to keep you still on the center of that hoop as he's feeding more out to you. Then you can more or less just hook it right onto the bit, right on the barge.

Q. Okay. And do you recall on August 20th, '97, seeing the six-foot hemp rope attached to that cable on the tug?

A. Any time we used that steel cable there that we were using that hemp rope.

Q. Okay. On August 20th you were working with Mr. Rutherford, correct, just before he was injured?

A. Correct.

Clapsadle - Shornack-Smith - 07/08/99

[32] Q. And who was the man on the tug, who was the man on the barge?

A. At that time, I believe we had just changed from Gene being a flopper. I went to the flopper at that time. Gene and I—Gene was on duty and I was his backup, so—Steve was in bed at the time.

When we unhooked off the empty and re-hooked up to the full, I believe I was the one that was on the barge and Gene was on the bow of the tug.

Q. Okay. Do you recall him—he was responsible, then, for taking the loop off of the front bit, or hoop as you described it, and handing it to you so you could face the tug to the barge.

A. Correct.

Q. Did you actually see him do that procedure?

A. Yes, I did. You really can't miss it. You got to be watching while he's handing it to you.

Q. Okay. And what—do you recall there being the six-foot hemp rope attached to the hoop?

A. Say for positive that it was there. Once we had put them on a steel cable, they were there, I believe, the rest of the time that I was on the tug when we had the steel cable on there.

Clapsadle - Shornack-Smith - 07/08/99

[33] Q. You said once you put them on there. Once you put what on? The hemp rope?

A. The hemp rope.

Q. Do you recall when that was done that season? When the hemp rope—

A. When I had first gone on the tug—I don't believe we had them on. On the steel cable. We had swapped out that steel cable to a lightweight, almost like a nylon, known as Kevlar.

We had problems with the Kevlar snapping from when you winch it up tight on the bit of the barge, so we removed that after we had broke it, and put the steel on. That was when we went to the hemp line hooked onto the steel cable for assisting you in lifting it up and lowering it down.

Q. So when you—now, are you saying when you joined the ship initially they were using the Kevlar line?

A. When I had joined the ship they were using a steel cable.

Q. Okay.

A. Now I understand they did have some Kevlar lines on there before I got there, had wore the out, and

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Clapsadle - Shornack-Smith - 07/08/99

[38] A. Once he hands the line to me, it is my job to hook them up to the corner bits on the barge. Once I'm hooked up on the barge, then the captain runs electric winches and tightens up the lines, pulls the tug and barge right together tight.

Q. How many lines are we talking about?

A. You're running two lines, one line off of its own winch. So you have two separate winches running two separate cable.

Q. And where was the second cable?

A. Well, with your cables for mating to the barge, you would run one cable off the port and one off the starboard.

Being the tug was so much wider—or, the barge was wider than the tug, you would be going off of your right side, as you port, out to the corner of the barge, then your other loop would come off of the winch, out to the left side of the tug.

So you more or less were making a V right back to the bow of the tug with your two hoops and the cable out to the barge.

Q. The idea is the tug is going to push the barge?

A. Correct.

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Clapsadle - Shornack-Smith - 07/08/99

[55] A. I don't recall if I had to sign anything there on that, but he did have me read it, and then I'm not sure if that was just something, an accident report or exactly what it was. I don't remember that.

Q. Okay. Do you know whether Lake Michigan had a safety program?

A. I'm really not sure on that.

Q. Did you ever—were you required to attend safety meetings?

A. Not to—not to my knowledge, no.

Q. Were you provided any safety booklets?

A. I'm—nothing that we were each issued. Thinking back, like I say, it's been a couple years, whether there was one there on the tug—like I say, I can't say for positive.

Q. How about safety equipment such as black belts?

A. Nobody, while I was on the rig, was issued anything there.

Now from what I understood, I think there was a—there was a back support or a—some kind of a lifting belt or something, I was told there was on there somewhere. But myself, I never used one, you know?

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Clapsadle - Cullinan - 07/08/99

[60] where there was maneuvering of the boat, or of the tug, that led to that breaking, is that correct?

A. That—that was the—that was what had happened there with the steel lines when we were maneuvering. We had just come off of the Rouge River onto the Detroit River there.

Q. Okay. Those steel lines didn't chafe the same way that Kevlar lines do, did they?

A. Not at all. No.

Q. Now, based on your experience, were the steel lines more durable than the Kevlar lines?

A. Yes. Yes.

Q. And the entire time you were on the Shirley Joy, you didn't have the problems that you had with the Kevlar lines when you were using the steel cables, did you?

A. No. No.

Q. In other words, none of the steel cables ever chafed and broke?

A. No.

Q. And if I had it correct, it was more than once that the Kevlar lines broke when they were used on the Shirley Joy?

[61] A. Correct.

Q. At one point while you were out there, brand new ones were brought on, and within a short period of time, those broke?

A. Yes. Broke a couple times.

Q. Okay. These lines that run from the dredge to the barge, those are permanently attached to the dredge, right?

A. That's correct. They are wired right into the winches right on the dredge.

Q. And the dredge doesn't go back and forth anywhere, does it? It basically stays in place in the river, or whatever's being dredged?

A. At the time that they're dredging when we're hooking to them and unhooking from the, they have spots that are steel eye beams that are dropped, and they're right down into the bottom, to where it's locked in place by steel poles.

Q. Okay. So they're not going in to resupply the dredge or anything like that, are they?

A. Pardon me?

Q. The dredge isn't going anywhere to be resupplied while it's out there doing the dredging, is it?

[62] A. No, it isn't. Any—anything they need, if they need fuel, we transfer them fuel or anything onto it off of the Shirley Joy.

Q. Would it be more difficult to change the lines on the dredge than it is on the tug? In other words, if the line snapped?

A. Yes. You have a lot more line there.

Q. So it's important to them that they use those steel cables off the dredge?

A. That's correct.

Q. When facing up the full barge to the tug, you mentioned one deck hand will be on the tug and one goes down onto the barge, correct?

A. That's correct.

Q. And the deck hand on the barge lifts the cable off the bit, lifts the eye of the cable off the bit; is that right?

A. When you're unhooking.

Q. Okay. Where is the bit—how high off the ground is that?

A. Now you're saying the bit on the barge?

Q. No, on the tug.

A. On the tug, when you're—

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[63] Q. When you're connecting to the tug—as I understood it, when you first got to the full barge, you got down on the barge and Mr. Rutherford stayed on the bow?

A. That's correct.

Q. Okay. And he at that point is lifting the eye—I'm sorry, go ahead and describe what he was doing.

A. He lifts the hoop of the cable off of the bit on the top up on the tug.

Q. Okay. Where is the bit on the tug?

A. It's right in the bow. Right at the further point forward on the—on the tug.

Q. Okay. Is it on the side of the tug?

A. No, it sticks straight up in the front.

Q. Okay. How high up off the ground is it?

A. From a loaded barge to that bit, I would say you're looking at least probably eight to ten feet.

Q. Okay. Is the hoop being lifted all the way from the ground of the tug up over the bit, or is the bit, the bottom of the bit, off of the ground?

A. The bottom of the bit is up, I would say probably knee high to where you have your sides of the tug that come around, and it's welded right in with the sides

[64] of the tug.

Q. Okay. So the deck hand who's up on the tug isn't lifting the eye off of the ground, is he?

A. No, where you grab that would be grabbing right about your knees or your thighs.

Q. And of the two deck hands, the one on the tug and the one on the barge, is it correct that the one on the barge has the more difficult job of the two?

A. Well, I would say, because once—once the guy on the tug hands you that cable down, you have to get hold of that cable and then back yourself up on to the barge farther because you're right where the tug and the barge are meeting.

Then you have to back up onto the barge and then swing yourself out to where you're swinging an angle from the side of the tug out to the corner of the barge.

Q. Okay. Does he hand you the hoop directly?

A. He hands the hoop of that down by lowering it down to me with the rope.

Q. Okay. So he's just holding the hoop of the cable for just a second or two, correct?

A. Well, he picks it up, then the weight of that

[65] cable he lowers down with the hemp rope.

Q. Okay. By way of lowering the rope. So he's got leverage up there?

A. Yeah. Yeah. So you don't have to lean over trying to lean over the tug so far.

Q. And is he using the same sort of stance that you mentioned before, sort of a tug-of-war stance when he's lowering it?

A. That, you're—you're not really leaned back as far, like you would be on the barge.

Q. Okay. Is there not as much weight you're dealing with up there as you are on the barge?

A. Well, you're—you're dealing with more or less just lowering that cable down. Once you're on the barge, you got to pull on that cable and more or less get what you can, a slack, out of that cable to stretch it out enough to make the bit.

Q. Okay. So gravity's sort of doing some of the work for the guy on the tub?

A. Correct.

Q. How close are those two deck hands, when you're working together? When he's lowering that eye to you?

A. Oh, you're, like I say, six, eight feet below.

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[66] Q. Okay. You're close enough to see the other deck hand?

A. Yes.

Q. And to hear him?

A. Yes.

Q. Okay. At any time on August 20th when you were on the barge and Gene Rutherford was on the tug lowering you the bit, you didn't notice anything—anything unusual about him, like he was in pain, did you?

A. Not right at that point, no.

Q. The first time was when he was on the barge later is when you noticed anything about him?

A. Yes. When I was coming back up the barge.

Q. Okay. And he didn't make any complaints, physical complaints, while he was still on the tug?

A. Not at that time.

Q. How did he—or how does one get, as he did, from the tug to the barge?

A. More or less on the tires on the front of the barge, they're put on, or on the front of the tug, they have a rubber—rubber push—push guard on there that's more or less built like a ladder.

* * * * * *

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[70] Q. What would happen if the line between a tug and a full barge were to snap? What happens?

A. Well, if you lose just one, you more or less have to—you can try to stop. If you try to stop, it will make the barge

swing in the direction opposite with the one that snapped, because you only have that one line.

But if you wanted—you try to keep the push, you would have to be cutting, you know, opposite of where your snapped line was, because you don't have nothing there holding that. That barge will just, more or less hinge. The barge will hinge right on the bow of the tug.

Q. It loses control of the barge?

A. Yeah. Yeah.

Q. And certainly, if both lines snap, then the tug doesn't have any control of it at all?

A. Then it's more or less up to the deck hand to get them cables out of the water, get 'em back onto the tug and then put a man on the barge while the tug swings around and comes in for a hookup to go to tow.

Q. And when the barge is floating unhooked from the tugs, is that in any way dangerous?

[71] A. Yeah. I would say it's pretty much dangerous to everybody.

Q. To your knowledge, no deck hands with Lake Michigan Contractors were ever denied the use of any safety belts or safety equipment, were they?

A. No.

MR. CULLINAN: That's all I have.

RE-EXAMINATION BY MS. SHORNACK-SMITH.

Q. Just a couple more. Mr. Clapsadle?

A. Yes.

Q. Was the dredge—were the dredge and barge the same length?

A. Pardon me?

Q. Were the dredge and the barge the same length?

A. I would say the dredge may have been a little bit longer than the barge.

Q. Okay. So when we referenced the bow and the stern lines between the dredge and the barge, are we talking about the lines being connected to the very front on the bow of the barge?

A. Well, that's your difference, where—where they

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 98CV769
	)	Judge Miles
LAKE MICHIGAN CONTRACTORS, INC.,	)	
	)	
Defendant.	)	

Transcript of deposition of WAYNE MOON, Agent of Defendant herein, called by the Plaintiff as upon cross-examination, pursuant to Notice and Court Order, pursuant to the Federal Rules of Civil Procedure, before Denise C. Winter, a Registered Merit Reporter and Notary Public within and for the State of Ohio on Thursday, September 2, 1999, at the offices of Merit Reporting Services, 2000 East Ninth Street, Suite 310, Cleveland, Ohio, commencing at 10:00 a.m. and concluding at 11:15 a.m.

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Cleveland Ohio 44115

216-781-7120

* * * * * *

[22] using the plasma line as opposed to the steel cable?

A. No.

Q. So it was primarily strength?

A. I believe so.

Q. Because it was more expensive; is that correct?

A. Significantly.

Q. You had to add stuff to it for abrasion purposes; is that correct?

A. Uh-huh. The cables chew up those bollards pretty good.

Q. Was the chafing material expensive, also?

A. The partek cost more than scrap fire hose, I'll say that, but no—

Q. When you say "fire hose"—

A. Canvass. Rubber hose with canvass covering.

Q. And you would buy scrap fire hose for that purpose?

A. No. We would have it on the boat. Stuff that had leaks in it, we would cut it up and use that.

Q. So the—let me ask you this: How many times do you recall ordering the plasma line for the Shirley Joy?

A. One time.

Q. Do you know what was used as chafing material for that?

A. The partek.

Q. For the plasma line that was used on the Shirley Joy?

[23] A. Uh-huh.

Q. What was it?

A. Partek, and in addition to fire or mill hose.

Q. When you say, "mill hose," what do you mean by that?

A. Mill hose is made of a very similar—it's a very similar composition, but it doesn't have the resistance to bursting that fire hose has.

Q. Was the plasma line ever put into actual use on the Shirley Joy?

A. Yes.

Q. Do you know when that began?

A. I don't have any specific date.

Q. Prior to August 20, 1997?

A. Yes. Sometime between May and August.

Q. Wear can lessen the strength of steel cable?

A. I would presume that it can.

Q. I'm just asking you that because you said all lines at some point wear down.

A. Yeah. A steel cable is typically a 6 by 19, what's called a 6 by 19 meaning there's 6 independent strands and each one of those independent strands has 19 wired twisted and when those things start to deteriorate, we don't usually wait for them to get to that point. We replace them.

What happens is that we have some misuse occasionally by personnel who don't set them over the cleats properly.

[24] Here's an illustration: It comes off of the boat and comes around and goes back to the boat. Sometimes it twists and they set it on there and they don't know it's twisted until the captain takes up the slack out of it. He says, it's twisted, you have to take the slack off of it. He'll back the boat up to take the slack off and take it off and twist it over. In the meanwhile, there's a little kink and at that point they get replaced.

Q. Do you know Gene Rutherford?

A. Yes; I do.

Q. You are aware that he had an accident on August 20, 1997?

A. That's correct.

Q. Do you know if the plasma cable was in use at that time?

A. I don't know. I don't think that is was, but I really don't know. I really don't know.

Q. It is not in use at this time—

A. No.

Q. —for the Lake Michigan Contractors; is that correct?

A. That's correct.

Q. And it appears, from what you have supplied to me today—we'll mark this, but you supplied to me today regarding the Notice Duces Tecum that you only ordered it one time?

[25] A. For the Shirley Joy; yes.

Q. Why is it no longer in use by Lake Michigan Contractors?

A. Several reasons.

Q. Okay.

A. Unsatisfactory performance is one of them, but the primary reason is the safety factor. I should say that. Unsatisfactory performance leading to an unsafe condition.

Q. We'll get back to that. Do you have a standard maintenance rotation for the steel cable?

A. Only a visual inspection. They all wear at different times. Only a visual inspection that when a cable develops what we call burrs, kinking or parting of strands. Cable will last indefinitely, but it depends on so many factors.

Q. Eventually it will wear down?

A. Absolutely.

Q. What was the unsatisfactory performance of the plasma line?

A. The unsatisfactory performance was that while the manufacturer's specifications stated that it had a higher resistance to breakage than a one-inch cable, we actually went to a larger diameter than one inch. We went to inch and a quarter.

Q. For?

A. Of the plasma to increase, to really go above and

[26] beyond what we felt was going to be the required breaking strength needed to operate the boat or to operate it safely.

Q. What's the smallest you can buy; do you know?

A. The smallest of?

Q. The plasma line.

A. To tell you the truth, I really don't know. I don't know how small it comes, but I know it can go quite large, as well. When we purchased that line, I talked to the owner about it and we were first looking at one inch versus one inch.

Q. One inch versus?

A. One-inch plasma versus one-inch cable and I told him how much higher the breaking strength was. It was several years ago, so I don't remember the exact number of pounds or whatever it's rated at, but his answer was go to inch and a quarter, it will be safer.

Q. Do you remember who you talked to?

A. Kathy Samsel. Are you talking about the application?

Q. What owner you talked to.

A. Of?

Q. The plasma. Who told you to go to an inch and a quarter?

A. Joe Walsh.

Q. Joe Walsh, the owner of the company?

A. Yes. Co-owner of Lake Michigan.

[27] Q. Who did he talk to?

A. About?

Q. I misunderstood. I thought you were talking to someone who you were buying the plasma line from. You told him the application it was used for and they told you to be safe, go to one and a quarter inch.

A. Not to be safe but to increase the safety factor; yeah. That would be Joe Walsh.

My discussions initially were with Kathy Samsel about different types of material, Kevlar, Spectra or plasma, and I reported back to the owner of Lake Michigan and said, here's what we got. Kevlar and Spectra do not have as high a breaking strength as plasma. They do not have the resistances to abrasion that plasma has and they do not have the resistances to heat fatigue that plasma has, and I says, that's what I think we should go with. And I said, it's a higher breaking strength with one-inch plasma as opposed to one-inch steel cable and I think we should go with that product. He says, that's fine, but go to an inch and a quarter.

Q. Okay. Do you know at the time that you were ordering—well, first let me ask you this—

MR. CARLEY: Can we mark those as 1 and 2?

(Documents marked for identification as

[28] Moon Deposition Exhibits 1 and 2) BY MR. CARLEY;

Q. Let me show you what's been marked as Moon Exhibit Number 1, and this looks like an invoice from the Samsel Supply Company; is that correct?

A. It's a photocopy of an invoice from the Samsel Supply Company; yes.

Q. I see there's some handwriting on it. It looks like Lorain and it says, Curly B. Is that your handwriting?

A. No.

Q. Do you know whose that is?

A. No; I don't. But I can safely say it's a member of our staff in Holland, Michigan.

Q. What has been marked as Moon Exhibit 2 looks like an invoice also from the Samsel Supply Company. The Exhibit 1 was dated 10/17/96. Exhibit 2 is dated 12/10/96. This has some handwriting on that. Is that your handwriting?

A. No.

Q. Do you know whose that might be?

A. I can only speculate it's a member of Lake Michigan staff somewhere.

Q. And that says?

A. Fairport, Shirley Joy.

Q. Also, it has something below it with a question mark. Do you know what that says?

[29] A. "Equipment," question mark.

Q. Do you know why that would be there?

A. I can tell you anything you want to know about any of this stuff. Someone wrote "equipment," on there prior to

wanting to—when they wrote "equipment," question mark, apparently they got it in their possession and said who do we charge this to? There's no mention up here as to what vessel there may be on this one; no. There's no mention of a vessel.

Typically when we use a PO, we don't use a number. We use the name of the vessel, but in this case, someone got this invoice and they said, "equipment," question mark. In other words, they're inquiring what does it go to, and Shirley Joy being that's the equipment that it went to and Fairport was the project, that was where the expense for the material was charged to.

Q. Where is Fairport at?

A. It's in—it's just east of Cleveland by maybe 30 miles. It was probably purchased during that project. I would think that R and M stands for repair and maintenance. That's a typical coding.

Q. It was purchased during that project?

A. I don't know that. It was charged to that project.

Q. Your belief, though, is that—I believe you testified earlier it went into use, the plasma line went

[30] into use, on the Shirley Joy sometime between May and August of '97.

A. The boat captain would be better suited to answer that question, but I believe that's the case.

Q. Do you know if the plasma line that was ordered was at least as strong as the—let me strike that question.

You say the plasma line was taken out of use because of its resistance to breakage?

A. No. It wasn't taken out of use because of its resistance to breakage. It was taken out of use because of its lack of resistance to breakage.

Q. What do you mean by that?

A. The captain come to me and he said, Wayne, he says, when we're using our one-inch cable, the motors that power the deck wenches aren't strong enough to break the cable. He says, these cables break from the twisting of the barges when they're in rough weather moving around, and he says, we can walk through the synthetic stuff with the motors at any time. If I overtighten them, somebody is going to get their head ripped off because these things shoot back like whips.

Q. Do the steel cable—what happens with the steel cables if it breaks?

A. Generally speaking, it drops. It drops in place. I think there's—if I had to speculate, I think that there's less stored energy there than there is in a line because

[31] that's a deck hand's worst nightmare. When a line breaks, you can hear it popping and getting ready. You can hear the stress. Most people flee when they hear that.

Q. That's one of the reasons you use that nylon line, is that correct, at the end of the steel cable?

A. Yeah; I would say so. That takes a lot of resistance. I never seen a shock line break.

Q. That's one of the reasons you use a shock line made of nylon would be to take the tautness out of the steel cable?

A. I can't say to take the tautness out of the cable. I would say it's more of when the boat is twisting, you know, either going around a corner or if the barges are twisting in opposite directions in the rough lake, that instead of the cable stretching, there's some give on the shock line so some of the energy is transferred from the cable to the line.

Q. Did you use the nylon shock line with the plasma lines?

A. I believe they did.

Q. You don't know for sure?

A. No. I don't know for sure, but I believe they did. I believe that shock lines are always used.

Q. Do you know when this captain came to you and told you about this potential breaking problem with the plasma line?

A. Sometime during the project in Rochester. I would

[32] think it would have been sometime in July or August. He had told me that they had broken the line and had to tie a knot in it, in the synthetic line, and he came to me and said—I'm not sure. He came to me on several occasions. First time he said, we broke that line and I'm not real confident that this stuff is all it's cracked up to be, and I says, okay. I said, that's fine. It still seems to be in pretty good shape, but I'm not real happy with it.

Then the second time it broke, he came to me and said, hey—I think it was the second time—he came to me and said, hey, this stuff has got to go.

Q. After he came to you—well, let me ask you this: Do you know if it was before or after Gene Rutherford's accident on August 20th, 1997 that the captain came to you?

A. I generally don't remember clearly at this particular point, but I think it was before.

Q. After the captain came to you about these problems, did you ever entertain getting the plasma lines again for the Shirley Joy?

A. Nope.

Q. When they were—the plasma line was taken out of use on the Shirley Joy, was it also taken out of use on other Lake Michigan vessels?

A. To be honest with you, we had it on the Curly B, and I truly don't remember. I believe it was taken out of service

[33] after that because the vessel was at the dock and not being used and I think we discontinued its use all together after that.

Q. On all vessels?

A. Yes.

Q. Do you know if anyone else ever, for Lake Michigan at least, any employee or agent ever ordered plasma line other than yourself?

A. I can only speak for the Ohio division and no one within the Ohio division did. I don't know if they used it in our operation in Holland, Michigan or down in Florida or whatever. I couldn't answer that.

Q. And the weight of the line did not come into consideration when you decided to go to the plasma line or you decided to recommend the plasma line?

A. I would say that that was a minor consideration.

Q. Why was that a minor consideration?

A. My concern is for the safety of the personnel above and beyond everything else and if that has a higher resistance, supposedly a higher resistance, to breakage. I will also state that given the alternatives of other synthetic, between Kevlar and Spectra, we went with what we knew of to be the top of the line.

Q. Was there ever any problem with regard to the weight of the steel cable? Any complaints about its weight by the

[34] deck hands?

A. Not to my knowledge.

Q. Do you know if Lake Michigan Contractors supplies weight belts or anything like that for use by deck hands?

A. Yes.

MR. CULLINAN: I object to that and I'll let him answer that one question. We're not going very far with anything other than lines. Go ahead. You can answer that.

A. Yes.

Q. Why is that done? Why do they have a weight belt?

MR. CULLINAN: That's it.

BY MR. CARLEY:

Q. Is it because of the fact of the steel cables, lifting the steel cables?

A. Many factors.

Q. Is that one of them?

MR. CULLINAN: I'm going to object. Don't answer that question.

A. No—okay.

MR. CARLEY: Why don't we give him a call because I want to get this answered?

MR. CULLINAN: Go ahead.

MR. CARLEY: Would you read the last two questions back, please?

* * * * * *